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In the Supreme Court of the United States

October Term, 1974
No. 74-1523

ROBERT DODSON, *et al.*,
Petitioners,

vs.

STATE OF OHIO,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF APPEALS
EIGHTH JUDICIAL DISTRICT OF OHIO

BRIEF OF RESPONDENT IN OPPOSITION

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

OBJECTIONS TO JURISDICTION

There is no substantial federal question which would require this Court to review this case.

The questions herein presented were raised in the trial court, the Court of Appeals for the Eighth Judicial District of Ohio (Cuyahoga County), and the Supreme Court of Ohio. The trial court declared the search warrant in question invalid but the Court of Appeals reversed this finding. The Supreme Court of Ohio dismissed petitioner's

appeal of the Court of Appeals' decision for the reason that no substantial constitutional question existed.

The Ohio courts decided this case in accordance with the Statutes and Constitution of the State of Ohio, the Constitution of the United States, and the applicable decisions of this Court. No substantial federal question is therefore presented by the petition for certiorari.

COUNTER QUESTIONS OF LAW

1. Probable cause for the issuance of a search warrant has been established where, in an affidavit supporting the search warrant, the affiant provides facts to the issuing magistrate that establish the credibility and reliability of the informant and facts which corroborate the information provided by the informant.

2. Where there is no evidence of intentional or bad faith misrepresentations in an affidavit in support of a search warrant, the search warrant will not be invalidated.

STATEMENT OF THE CASE

On November 29, 1973, Captain Delau of the Cleveland, Ohio, Police Department, Vice Enforcement Unit, obtained a search warrant for the premises located at 10400 Buckeye Road, Cleveland, Ohio, from the Honorable James P. Kilbane, Judge of the Court of Common Pleas, Cuyahoga County, Ohio. This search warrant was executed on the same day at the premises indicated, and six individuals, petitioners herein, were arrested on the premises and certain physical property was seized on the premises pursuant to the command of the search warrant. The petitioners were subsequently charged with and indicted for a violation of Ohio Revised Code, Section 2915.13, in that they "unlawfully did establish, open, set foot upon, carry on and promote a certain scheme of chance known as Numbers Game, to wit: 'Clearing House'."

Petitioners filed a motion to suppress and a motion for the return of illegally seized property, and the same was duly heard on February 7, 1974 before the Honorable Phillip C. Barragate, Judge of the Court of Common Pleas, Cuyahoga County, Ohio.

The court granted petitioners' motion to suppress and ordered all property seized returned. The State of Ohio timely filed a notice of appeal on questions of law and a motion to stay return of property, which motion was granted on February 27, 1974.

At the conclusion of testimony and argument by counsel, the trial court suppressed the evidence in question, holding, in effect, that the affidavit upon which the search warrant was based (See Appendix E of petitioner's brief) failed to establish probable cause for the issuance thereof and ordered all property taken from the premises returned (R. 77).

The State appealed the trial court's ruling to the Court of Appeals, Cuyahoga County, Eighth Judicial District, which court reversed the lower court and remanded this case for further proceedings according to law. The petitioners then appealed to the Ohio Supreme Court, which court dismissed petitioner's appeal for the reason that no substantial constitutional question existed.

REASONS FOR DENYING THE WRIT

1. Probable cause for the issuance of a search warrant has been established where, in an affidavit supporting the search warrant, the affiant provides facts to the issuing magistrate that establish the credibility and reliability of the informant and facts which corroborate the information provided by the informant.

Although the trial court heard testimony on the motion to suppress, "It is elementary that in passing on the validity of a warrant, the reviewing court may consider *only* information brought to the magistrate's attention." *Aguilar v. Texas,* 378 U.S. 108, 109 (1964), 12 L. Ed. 2d 723, 725, 84 S. Ct. 1509.

Rule 41(C) of the Ohio Rules of Criminal Procedure provides in part, that the judge issuing a search warrant on the basis of an affidavit:

> ". . . may require the affiant to appear personally, and may examine under oath the affiant and any witnesses he may produce. Such testimony shall be admissible at a hearing on a motion to suppress if taken down by a court reporter or recording equipment, transcribed and made part of the affidavit."

The only information brought to the attention of Judge Kilbane, the issuing magistrate, was that contained in Captain Delau's affidavit (R. 58, 59). Therefore, only the information contained in this affidavit (See Appendix E, petitioner's brief) may be considered in determining whether probable cause existed for the issuance of the search warrant here in question.

It cannot be questioned that hearsay may be the basis for the issuance of a search warrant. *Jones v. United States,*

362 U.S. 257, 272, 4 L. Ed. 2d 697, 708, 80 S. Ct. 725 (1960); *Aguilar, supra,* 378 U.S. at 114. This is true where the magistrate is:

> ". . . 'Informed of some of the underlying circumstances' supporting the affiant's conclusions and his belief that any informant involved 'whose identity need not be disclosed . . . was "credible" or his information "reliable."'" *Aguilar, supra,* cited in *United States v. Ventresca,* 380 U.S. 102, 13 L. Ed. 2d 684, 698, 85 S. Ct. 741 (1965).

This requirement has been referred to as the *Aguilar* "two-pronged" test, in that the issuing magistrate must, first, be informed of some of the underlying circumstances from which the affiant concluded that the informant's conclusions were reliable and/or that the affiant's conclusions were reliable. Secondly, some of the underlying facts and circumstances from which the affiant concluded that the informant was credible or his information reliable also need be presented to the neutral magistrate.

This "two-pronged" test required by *Aguilar* is complied with in the instant affidavit. Looking first to the requirement that some of the underlying circumstances supporting an informant's conclusions be set forth in the affidavit, the affidavit reads:

> "This informant has advised the affiant that he has visited the above described premises on numerous occasions and also that his last appearance that [sic] the above described premises has been within the past week. This informant has related to the affiant that numerous violations of the law with respect to clearing house operations and numbers games are being conducted at the above described premises.

"The informant has related to the affiant that the person in charge of the clearing house office is one Robert Dodson (petitioner herein)."

The informant, therefore, had personal knowledge of the fact, alleged in the affidavit, that illegal numbers or clearing house activity was taking place in the premises to be searched. This is quite unlike the critical situation in *Aguilar, supra,* where there was no indication that the informant had personal knowledge of the facts alleged in the affidavit. In the present case, the informant personally visited the premises to be searched on numerous occasions, the most recent within the week immediately prior to the search. It should be noted here that there certainly can be no reasonable contention that the informant's observations of the criminal activity were too old to establish probable cause at the time the warrant was issued. (Cf. *United States v. Harris,* 403 U.S. 573, 29 L. Ed. 2d 723, 91 S. Ct. 2075 (1971), wherein the informant's observations were "within the past two weeks," and the affidavit and search warrant were held valid.)

Where the information relative to the informant's personal observation is coupled with the statement in the affidavit that the informant ". . . has given reliable information that has lead to the arrest of several persons in connection with gambling violations including number games and other various crimes," it becomes obvious that the informant knows the numbers game and clearing house operations. Thus the neutral magistrate could conclude that because of the informant's personal observations of the criminal activity that the affiant's information was not merely casual street rumor.

The Ohio Supreme Court, in *State v. Haynes,* 25 Ohio St. 2d 264, 54 Ohio Op. 2d 379 (1971) (*reversed on other grounds*) compared the fact pattern in *Spinelli v. United*

States, 393 U.S. 410, 21 L. Ed. 2d 637, 89 S. Ct. 584 (1969), with that in *Haynes, supra,* wherein a search warrant based upon an affidavit was issued, the affidavit reciting in part that a named informant personally purchased marijuana from the defendant. In *Spinelli, supra,* this Court at p. 416, stated:

"We are not told how the F.B.I.'s source received his information—it is not alleged that the informant personally observed Spinelli at work or that he had ever placed a bet with him. . . In the absence of a statement detailing the manner in which the information was gathered, it is especially important that the tip described the accused's criminal activity in sufficient detail that the magistrate know that he is relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation."

Comparing the two fact situations, the Ohio Supreme Court stated in *Haynes, supra,* at 267-268:

"It may be concluded from the above statement in *Spinelli* (referring to the statement quoted above) that if the affidavit sets forth that the informer obtained his information as a result of his own personal experience and sets forth reasons for the reliability of the information, the affidavit would be sufficient to sustain a search warrant."

It is seen therefore, that the statements contained in the instant affidavit, at least with respect to the informant having direct personal knowledge of criminal activity as opposed to indirect information, are much closer akin to the situation in *Haynes* than to *Spinelli.* On this basis alone it would be possible to hold this part of the affidavit sufficient to sustain the search warrant, since the informant had per-

sonal knowledge and observation of the criminal activity and, as indicated above, there are reasons set forth for crediting the reliability of this information.

The second "prong" of the *Aguilar* "two-prong" test is that the informant's reliability and/or credibility need be shown in some manner. Such credibility and reliability are shown by the following statements of the affidavit:

> "The affiant states that he has received reliable information from an informant who has provided the affiant with information in the past which has proven to be reliable and which as [sic] resulted in the arrest and conviction of gambling violators. * * * His information involving individuals in these crimes [sic] activities has proven to be reliable by several investigation(s) by member(s) of the Cleveland Police Department in the past."

This Court has recognized that an informant's reliability may be established by showing that he has previously given information that proved reliable. See *McCray v. Illinois*, 386 U.S. 30, 18 L. Ed. 2d 62, 87 S. Ct. 1056 (1967). In the case at bar, the affidavit contains several statements relative to the informant's reliability in that his information had led to arrests and convictions and has aided in other investigations.

Thus the "two-pronged" test of *Aguilar* is more than adequately met. Not only has the instant affidavit stated facts sufficient from which the issuing magistrate could conclude that the informant's information was reliable because of the informant's personal observations, but it has also further established the informant's reliability and credibility by reciting instances wherein the informant's previous information was credible. Thus, in all respects, the requirements of the *Aguilar* tests have been met.

Assuming, *arguendo*, that Captain Delau's affidavit did not fully meet the requirements of the *Aguilar* tests, it would still pass muster under the *Spinelli* standard:

> "If the tip (informant's) is found inadequate under *Aguilar*, the other allegations which corroborate the information contained in the hearsay report should then be considered." *Spinelli, supra*, at 643.

Under *Spinelli*, where such sufficient corroborative information is present in the affidavit, there may be a substantial basis for a finding of probable cause upon which to issue a search warrant.

The affidavit recites that upon receiving the "tip" or information from the informant, the affiant, Captain Delau, ". . . personally has maintained a surveillance of the above described building for the past week." Thus begins the corroboration of the informant's information.

Captain Delau's affidavit recites that:

> ". . . he has seen individuals who have been known to be past violators of the gambling laws of the State of Ohio enter the above described premises. . . [A]nd that those people coming and going are personally known to the affiant in connection with his police duty as a member of the Vice-Enforcement Unit."

The affidavit further states that:

> ". . . Robert Dodson is personally known to him (Captain Delau) in connection with his police duties as a member of the Vice-Enforcement Unit, and that Robert Dodson has a history of clearing house violations."

Finally, in this connection, the affidavit states that the affiant:

> ". . . has information that Robert Dodson has entered the above described building on at least three separate dates during the past week."

The information referred to immediately above was personal information of Captain Delau's obtained through his week long surveillance (See Record). However, the affidavit does not read "personal information," therefore, the issuing magistrate did not have this information to consider. Nevertheless, the other statements referred to above in the affidavit are substantially and effectively corroborative of the informant's tip relative to gambling and/or numbers violations occurring at the premises indicated.

It must be noted here that this information and knowledge on the part of Captain Delau is of great significance. As this Court stated in *United States v. Harris, supra,* at 733:

> "We cannot conclude that a policeman's knowledge of a suspect's reputation . . . is not a 'practical consideration of everyday life' upon which an officer (or a magistrate) may properly rely in assessing the reliability of an informant's tip. To the extent that *Spinelli* prohibits the use of such probative information, it has no support in our prior cases, logic, or experience and we decline to apply it to preclude a magistrate from relying on a law enforcement officer's knowledge of a suspect's reputation."

Captain Delau certainly must be commended for the manner in which he pursued the investigation of the criminal activity alleged in his informant's tip. Perhaps a less circumspect and diligent officer would have sought a search warrant only on the basis of the uncorroborated tip, and there is ample reason (cited herein) to believe that even such a warrant would have been valid and proper. However, Captain Delau spent a week surveilling the premises and activity surrounding it, which surveillance further corroborated the "suspicions engendered by the

informant's report to ripen into a judgment that a crime was probably being committed." *Spinelli, supra,* at 645.

The *Aguilar* and *Spinelli* requirements all having been met in all particulars, there was more than ample cause for the issuing magistrate to determine that probable cause had been established for the issuance of a search warrant. Some of the underlying circumstances surrounding the informant's information were recited in the affidavit and reasons for crediting the informant's information were given. In a similar situation where a magistrate found probable cause for the issuance of a search warrant, this Court stated:

> ". . . the courts should not invalidate the warrant by interpreting the affidavit in a hypertechnical rather than a commonsense, manner. Although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants." *United States v. Ventresca, supra,* at 698, citing *Jones v. United States, supra.*

In determining whether probable cause exists for the issuance of a search warrant:

> ". . . magistrates are not to be confined by niggardly limitations or by resctrictions on the use of their common sense, *United States v. Ventresca, supra,* 108; and their determination of probable cause should be paid great deference by reviewing courts, *Jones v. United States, supra,* 270-271. *Spinelli v. United States,* at 645."

2. Where there is no evidence of intentional or bad faith misrepresentations in an affidavit in support of a search warrant, the search warrant will not be invalidated.

The petitioners contend that the affiant in the instant matter, Captain Delau, made material and intentional misstatements in his affidavit in support of the search warrant. When the affidavit is read as a whole, and in a commonsense manner, this contention is obviously without merit.

Unfortunately, counsel for the petitioners has allowed his obviously personal characterization of Captain Delau's credibility as an affiant to permeate his legal contentions (See petitioners' brief, pp. 13, 28, 29). The alleged material misrepresentations complained of are: (1) That Captain Delau personally knew only Dodson, and, (2) That he failed to state in his affidavit that Dodson's prior violation of the law was a twelve year old offense. The record will indicate that Captain Delau knew of petitioner Jackson's criminal violations through his contact with other members of the police force. Surely this was personal information. With respect to Dodson's prior record, would petitioners require that only "recent" convictions be used in determining reputation, and if so, how recent? Additionally, can the failure to state in the affidavit the year of Dodson's conviction be construed as a material or intentional misrepresentation of the facts known to Captain Delau?

There is nothing in the record or the affidavit to suggest that any misstatements, if there actually be any, were other than good faith omissions or innocent misrepresentations. Captain Delau was neither reckless nor intentionally untruthful in his affidavit. See *United States v. Carmichael*, 489 F.2d 983 (7th Cir., 1973). Any inaccuracies in the affidavit are at most peripheral in nature and there are no material misstatements made in connection with the securing of the search warrant nor can it reasonably or logically be said that Captain Delau was attempting

to deceive the issuing magistrate. (See *United States v. Thomas*, 489 F.2d 664, 669 (5th Cir., 1973)).

The instant affidavit is sufficient on its face to support the issuance of the search warrant. The affiant did not attempt to deliberately deceive the issuing magistrate and even those inferences conjured up by the petitioners fail to show intentional or recklessly untruthful misrepresentations or unintentional misrepresentations of material facts.

CONCLUSION

All of the facts surrounding the affiant's corroboration of the informant's tip certainly could and should have led a police officer familiar with gambling operations to conclude as Captain Delau did in this matter. The information obtained by the affiant was gained by a credible informant in a reliable manner which, when coupled with the affiant's own knowledge of the suspect's background and reputation, and the affiant's corroboration of the informant's tip, afforded a basis upon which a neutral magistrate could reasonably issue a warrant.

It is respectfully submitted, and cannot be emphasized too much, that when the affidavit here in question is read as a whole, in a common sense manner, eliminating the niggardly hypertechnicality referred to by this Court in *Jones, supra*, and *Ventresca, supra*, there can be no question as to its having established probable cause upon which a search warrant could legally be issued.

We respectfully urge that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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